UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREGORY GARVEY, Sr. on behalf of himself and on behalf of others similarly situated, Plaintiffs	)	Civil Action No. 07-30049-KPN
v.	)	
FREDERICK B. MACDONALD and FORBES BYRON in their individual capacities, Defendants	)	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Gregory Garvey and the plaintiff class submit this memorandum in support of their motion for summary judgment. This is a civil rights class action for Fourth Amendment violations under 42 U.S.C. § 1983 against Franklin County Sheriff Frederick Macdonald and Special Sheriff Forbes Bryon. Plaintiffs seek money damages. Plaintiffs challenge defendants' policy of requiring employees under their supervision to strip search all prearraignment detainees at the Franklin County Jail without individualized reasonable suspicion. This policy, which was in place throughout the class period (March 28, 2004 to February 24, 2007, inclusive), affected hundreds of individuals and violated clearly established law. Defendants admit that they maintained the blanket strip-search policy and that employees followed the policy. Because neither these nor any other material facts are in dispute, summary judgment is appropriate.

STATEMENT OF FACTS

At approximately 11:00 pm on January 30, 2007, Sunderland police officers came to Plaintiff Gregory Garvey's home and arrested him on a default warrant for failure to appear in court on the charge of operating on a suspended driver's license. *Plaintiffs' Local Rule 56.1 Statement ("Pl. 56.1 Statement")* ¶ *25.* Mr. Garvey had not received notice of the court date. *Id.*

¶ *24.* Sunderland police officers took him to the Franklin County Jail and House of Correction ("Franklin County Jail") in Greenfield, Massachusetts, to be held until he could appear in court the next morning. *Id.* ¶ *26.* Police officers in Sunderland and other police departments in Franklin County regularly brought arrestees and individuals arrested on default or other warrants (collectively, "prearraignment detainees") to the Franklin County Jail to be held before their first court appearance. *Id.* ¶ *5.* The facility housed prearraignment detainees, detainees being held pending trial ("pretrial detainees"), and prisoners serving committed sentences. *Id.* ¶ *6.*

When Mr. Garvey arrived at the Franklin County Jail, a correctional officer placed him in a cell by himself in the booking area. *Id.* ¶ *26.* Next, a uniformed correctional officer entered the cell and ordered Mr. Garvey to take off all of his clothes. *Id.* ¶ *27.* When Mr. Garvey was completely naked, the corrections officer said, "We have to watch you do it. Bend over. Spread your cheeks." *Id.* Garvey did as he was told. *Id.* The officer looked at his naked body, including his genitals. *Id.* There was no reason for the officer to believe Mr. Garvey had hidden contraband, and none was found during the strip search. *Id.* ¶ *33.*

After the strip search, the officer ordered Mr. Garvey to dress in a jail jump suit. *Id.* ¶ *28.* After Mr. Garvey did so, he was ordered to leave the cell for booking. *Id.* ¶ *29.* The booking officer asked him questions and took his photograph. *Id.* After the booking process, an officer put him back in the same cell in the booking area. *Id.* Mr. Garvey remained in that cell by himself until morning. *Id.* Jail records show that Garvey was booked into the jail at 1:19 a.m. on January 31, 2007. *Id.* ¶ *30.* At approximately seven o'clock in the morning, a uniformed corrections officer came into Mr. Garvey's cell. *Id.* ¶ *31.* He ordered Mr. Garvey to remove the jail uniform and his underwear. *Id.* Once again when Mr. Garvey was completely naked, the officer ordered

him to bend over and spread his buttocks. *Id.* The officer looked at his naked body, including his genitals. *Id.* There was no reason for the officer to believe Mr. Garvey had hidden contraband, and none was found during the strip search. *Id.* ¶ *33.* After the strip search, Mr. Garvey was allowed to put on his clothing. *Id.* ¶ *31.* Afterwards Mr. Garvey was chained to other prisoners and taken to Greenfield District Court. *Id.* ¶ *32.* This was the first time he had come in contact with any other prisoners. *Id.* When Garvey appeared in court, the judge dismissed the charges against him. *Id.* ¶ *34.* He was released from custody and allowed to go home. *Id.*

Mr. Garvey's experience was typical of other prearraignment detainees at the Franklin County Jail during the class period. *Id.* ¶ *35.* Defendants' policy and practice required that correctional officers strip-search all prearraignment detainees[1] both at the time of admission to the jail and before leaving for a first court appearance, with the sole exception of those people who were held in protective custody. *Id.* ¶ *4.* The strip-search upon admission was conducted before the detainee went through the booking process. *Id.* ¶ 10. All prearraignment detainees were strip-searched without regard to the crimes for which they were being held, and without regard to whether the searching officer suspected that the particular individual being searched was carrying weapons, drugs, or other contraband. *Id.* ¶ *13.* All detainees were strip-searched without regard to where in the facility they would be housed, and without regard to whether they would come into contact with other inmates. *Id.* ¶ *14.* The manner in which Mr. Garvey was strip-searched was also consistent with jail policy and procedure, and typical of the manner in

[1] The memo uses the term "prearraignment detainees" to refer to individuals detained while waiting for bail to be set or for a first court appearance after being arrested, or while waiting for a first court appearance after being arrested on a default or other warrant.

which other detainees were strip searched. *Id.* ¶ *11*.[2]

Approximately 927 people were held as prearraignment detainees during the class period. *Id.* ¶ *15*. In only one instance during the class period were drugs found as a result of a strip search; that individual had been brought in for possession of drugs with intent to distribute and is not part of the class in this case. *Id.* ¶ *17*. In another instance a strip-search revealed that an individual had pierced nipples with rings fused together (such that they could not be removed by hand). *Id.* In no other instance during the class period was a strip-search necessary to reveal drugs or contraband. *Id.* ¶ *18*. In only three instances (besides the two described above) was contraband found on a prearraignment detainee during the booking process at the Franklin County Jail. *Id.* In each of these three cases, however, drugs were found in the individual's clothing or backpack, and thus could have been found without subjecting the individuals to a strip-search. *Id.*

Defendant Sheriff Frederick Macdonald has been the Franklin County sheriff since 1993. *Id.* ¶ *1*. As the top official in the Franklin County Sheriff's Office, he has statutory control and responsibility, and is the final policymaker, for the Franklin County Jail. *Id.* He is responsible for ensuring that the policies of the Jail comply with the Constitution. *Id.* Since 1997, Defendant Special Sheriff Forbes Byron has been Superintendent of the Jail. *Id.* ¶ *2*. He is the chief administrative officer of the Sheriff's Office, and is in charge of operations at the Jail. *Id.* Sheriff Macdonald issued and Superintendent Byron implemented General Order 506, which contained the written strip-search policy that was in place throughout the class period. *Id.* ¶ *3*.

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[2] One officer described his standard instructions to the naked prisoner as follows: "Put your hands up, open your fingers, open your mouth, lift up your tongue, show me behind your ears, lift up your genitals, turn around, show me the bottoms of each foot, and spread your buttocks with your hands." *Id.* (citing Deposition of Peter Dionne at 8). Other officers' descriptions are similar. *Milton Decl.* ¶ *11*.

Superintendent Byron reviewed and supported the policy before it took effect. *Id.*

On April 15, 2008, this Court certified the following class under Rule 23(b)(3) of the Federal Rules of Civil Procedure: All people strip searched without individualized reasonable suspicion on or after March 28, 2004, and before February 25, 2007, at the Franklin County Jail (a) while waiting for bail to be set or for a first court appearance after being arrested on charges that did not involve a weapon, drugs, contraband or a violent felony, or (b) while waiting for a first court appearance after being arrested on a default or other warrant for charges that did not involve a weapon, drugs, contraband or a violent felony. The class consists of approximately 500 people. *Milton Decl. ¶¶ 7-8.*

ARGUMENT

I. STANDARD OF REVIEW

A district court should enter summary judgment if, viewing the record in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Mariasch v. Gillette Co.*, 521 F.3d 68, 71 (1st Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). "Once the moving party avers the absence of genuine issues of material fact, the nonmovant must show that a factual dispute does exist, but summary judgment cannot be defeated by relying on improbable inferences, conclusory allegations, or rank speculation." *Id.* (quoting *Ingram v. Brink's, Inc.,* 414 F.3d 222, 228-29 (1st Cir. 2005)).

II. DEFENDANTS' UNIFORM POLICY VIOLATED CLEAR FIRST CIRCUIT PRECEDENT REQUIRING REASONABLE SUSPICION BEFORE STRIP-SEARCHING PREARRAIGNMENT DETAINEES

Well before the beginning of the class period, the law in the First Circuit clearly

established that a prearraignment detainee may not be subjected to a strip search absent reasonable suspicion that he or she is concealing contraband or weapons. *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001). A blanket strip-search policy of all pre-arraignment detainees cannot be justified by mere invocation of security considerations or simply because pre-arraignment detainees are housed in the general population. *Id. at 113.* Since it is undisputed that defendants maintained and enforced a blanket strip-search policy throughout the class period, summary judgment is appropriate.[3]

"[P]retrial detainees retain constitutional rights despite their incarceration, including basic Fourth Amendment rights against unreasonable searches and seizures." *Roberts*, 239 F.3d at 109. The Fourth Amendment applies to strip searches and visual body cavity searches[4] of pretrial detainees. *Id.; Swain v. Spinney,* 117 F.3d 1, 6 (1st Cir. 1997). Determining whether a particular search is constitutional "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Swain,* 117 F.3d at 6 (quoting *Bell v. Wolfish,* 441 U.S. 520, 559 (1979)).

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[3] As sheriff throughout the class period, Defendant Macdonald had final policy making authority for establishing the strip search policies in question, and thus "clearly bears responsibility" for them. *Ford v. City of Boston,* 154 F.Supp.2d 131, 146 (D. Mass. 2001). Defendant Byron likewise is liable for the policies, which he knew about, supported, and implemented, and for which he admits responsibility, as chief administrative officer of the Jail. *Pl. 56.1 Statement ¶ 2-3. See Camilo-Robles v. Zapata,* 175 F.3d 41, 43-44 (1st Cir. 1999) (supervisory liability appropriate where defendant was "primary actor involved in, or a prime mover behind, the underlying violation" such that there is "an affirmative link, whether through direct participation or through conduct that amounts to condonation or tacit authorization").

[4] The First Circuit defines a "strip search" as a visual inspection of an inmate's naked body, and a "visual body cavity search" as a strip search that includes the visual inspection of an inmate's anal and genital areas. *Blackburn v. Snow*, 771 F.2d 556, 561 n. 3 (1st Cir. 1985). As described below, the searches at Franklin County were visual body cavity searches. Because both strip searches and visual body cavity searches require reasonable suspicion, *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997), for ease of reference this memo uses the "strip-search" generically to refer to both.

Applying this balancing test, the First Circuit has recognized that

> strip and visual body cavity searches impinge seriously upon the values that the Fourth Amendment was meant to protect. These searches require an arrestee not only to strip naked in front of a stranger, but also to expose the most private areas of her body to others. This is often, as here, done while the person arrested is required to assume degrading and humiliating positions. Our circuit has recognize[d], as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities.

Swain, 117 F.3d at 6 (citation and internal quotation marks omitted); *accord Roberts,* 239 F.3d at 110 ("[W]e consider [visual body cavity] searches an extreme intrusion on personal privacy and an offense to the dignity of the individual.")(citation and internal quotation marks omitted).

Against this "extreme intrusion on personal privacy" the court must weigh the justification for the search. *Roberts,* 239 F.3d at 110-11. In this case, Franklin County Jail officials, following the directives of the defendants, did not conduct an evaluation to determine whether individualized reasonable suspicion existed before the officials strip-searched every prearraignment detainee as a matter of routine policy before the detainee was booked into the jail. Sheriff's department employees strip searched class members without regard to whether there was any cause to believe the person was carrying weapons, drugs, or other contraband.[5] Thus, the only possible justification for subjecting all class members to a strip and visual body cavity search would be a finding that institutional security concerns outweighed every individual's rights to dignity and privacy. *Roberts,* 239 F.3d at 110-11; *Tardiff v. Knox County,* 573 F. Supp.

[5] Individuals who were arrested for crimes involving a weapon, drugs, contraband or a violent felony are not part of the class. Although these individuals were not in fact strip-searched because of the nature of their charges, they *could* have been lawfully strip-searched for this reason, and thus have been excluded from the class. *See Roberts,* 239 F.3d at 112 ("The reasonable suspicion standard may be met simply by the fact that the inmate was charged with a violent felony.").

2d 301, 305 (D. Me. 2008); *Ford,* 154 F. Supp. 2d at 142. Nothing in the record supports such a finding. On the contrary, courts, including the First Circuit in *Roberts,* have rejected the very security rationales that Defendants here are likely to advance. *Roberts,* 239 F.3d at 111-13; *Tardiff,* 573 F.Supp. 2d at 307; *Ford,* 154 F. Supp. 2d at 142-44.

In *Roberts,* the Court held that the Rhode Island Department of Correction's policy of strip-searching all pretrial detainees at the Adult Correctional Institute ("ACI") was unconstitutional. The Court did so even though Rhode Island did not have separate facilities to house pretrial detainees, who were held in the ACI along with prisoners serving committed state sentences. *Roberts,* 239 F.3d at 109, 113. That the ACI intake area was "considered a maximum security prison," *id.* at 109, did not justify the blanket search policy, nor did the fact that detainees intermingled with the general prison population, *id.* at 112-13. Nor did the "lengthy history of contraband problems" at the ACI save the blanket policy from being held unconstitutional. *Id.* at 112. The record in *Roberts* revealed that in virtually all instances where contraband was found on an incoming inmate, a strip-search was unnecessary to discover the contraband, which was retrieved from the detainees' clothes or effects. *Id.* The same is true here, as is discussed below.

Roberts dictates the outcome in this case. The fact that prearraignment detainees were housed in the same building as inmates being held pending trial and serving sentences does not justify defendants' blanket strip-search policy, nor does the fact that on occasion some prearraignment detainees may have been housed in general population. In *Roberts,* even routine intermingling did not justify strip-searching everyone. *Roberts,* 239 F.3d at 112-13; *see also Ford,* 154 F. Supp. 2d at 140.

Moreover, while defendants may invoke a "history of contraband problems" in support of the policy, scrutiny of the record belies any claim that *strip*-searching all detainees was necessary to combat these supposed problems. In response to discovery requests seeking information on all contraband or weapons found "as a result of strip searches" of detainees during the class period, defendants produced only seven reports from this nearly three-year period during which there were approximately 927 prearraignment intakes. Of the seven incidents, a strip-search was necessary to reveal the contraband in only one – a strip-search during which drugs fell from the detainee's buttocks. However, that detainee was being held on a drug distribution charge and could have been lawfully strip searched because the offense supplied the needed individualized suspicion. He is therefore not a class member.

All but one of the remaining six reports of contraband either did not involve prearraignment detainees or strip-searches, or involved drugs found in the individual's clothing or personal property.[6] "The lack of specific instances where a body cavity search was necessary to discover contraband supports a finding that the policy of searching all inmates is an unreasonable one." *Roberts,* 239 F.3d at 112; *see also Tardiff,* 573 F. Supp. 2d at 307 n.7 (incidents where contraband found during cell shakedowns or in inmates' clothing "are irrelevant to the question of whether a strip and visual body cavity search was necessary"). The lack of contraband found concealed on or in the naked bodies of prearraignment detainees is not surprising, "given the essentially unplanned nature of an arrest and subsequent incarceration." *Roberts,* 239 F.3d at 111; *see also Ford,* 154 F.Supp.2d at 142 ("It defies belief to suppose that

[6] The only other report of "contraband" involved an individual who had permanently attached nipple rings, which presumably could have been detected by a far less invasive pat-search.

any of the plaintiffs deliberately sought arrest in order to smuggle contraband or weapons into the Jail.").

In short, and as a matter of law, Defendants' institutional concerns do not justify the "severe if not gross interference with a person's privacy" that their policy of strip-searching all prearraignment detainees entailed. *Roberts,* 239 F.3d at 110. "[A]n indiscriminate strip search policy routinely applied ... can not be justified simply on the basis of administrative ease in attending to security considerations." *Id.* at 113. Accordingly, summary judgment on liability is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment.

RESPECTFULLY SUBMITTED,

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Date: November 17, 2008

CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via ECF.

Date: 11/17/08 */s/ Howard Friedman*
Howard Friedman